No. 12,236

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

CHRYSLER CORPORATION PARTS WHOLESALERS NORTHWEST REGION, MOPAR CLUB, S. L. SAVIDGE, INC., AMERICAN AUTOMOBILE COMPANY, COMMERCIAL AUTOMOTIVE SERVICE, INC., WINTHROP MOTOR COMPANY, RIEGEL BROTHERS, INC., W. G. POWELL, JOHN MUNSTER, STANLEY SAYRES, RALPH W. HANSON, FRANK L. HAWKINS, CARL J. BRUSH, GEORGE W. MILLER, STANLEY PETERSON, DEE R. RIEGEL, T. H. NAISMITH, APPELLEES

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The indictment returned in the United States District Court for the Western District of Washington, Northern Division against the appellees on December 30, 1948 charges a violation of Section 1 of the Sherman Act (26 Stat. 209; 15 U.S.C. 1) in that the appellees engaged in an unlawful combination and conspiracy to fix, maintain and control prices and discounts applicable to the sale in the State of Washington of Chrysler replacement parts and engines produced outside the State of Washington (R. 3). Jurisdiction in the District Court was based on 18 U.S.C. 3231. The defendants filed motions to dismiss the indictment, and, following hearing, the District Court on March 19, 1949 rendered an oral opinion (R. 22), which is set forth in full at p. 6 herein, and entered an order dismissing the indictment (R. 24). From that order appellant has taken this appeal.

Since the District Court has certified that its decision was not based solely upon the validity or construction

of the statute upon which the indictment is founded, but rather was based in part upon the insufficiency of the indictment as a pleading (R. 26), appeal has been taken to this Court in accordance with the provisions of 18 U.S.C. 3731.

STATUTE INVOLVED

Section 1 of the Act of July 2, 1890, commonly known as the Sherman Act, 26 Stat. 209, as amended by 50 Stat. 693, 15 U.S.C. 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

STATEMENT OF THE CASE

The appellees consist of five corporations, comprising all of the wholesalers of replacements parts and engines for Chrysler-built automobiles in the State of Washington; ten individuals who are officers of these five corporations; and two trade associations, the creatures of the five corporate appellees, one of which is an association of these five corporations, and the other of which is an association of four of these corporations and retail Chrysler dealers in the State of Washington (R. 3). The five corporate wholesalers purchase all replacement parts and engines from Chrysler Corporation manufacturing subsidiaries located outside of the State of Washington, and together they purchase 90% of such parts and engines sold in the State of Washington. The corporate wholesalers sell to consumers of these parts and engines—that is, persons owning automobiles who are the ultimate users—and also sell to Chrysler dealers within the State of Washington who, in turn, sell to consumers. The corporate appellees thus engage in both a retail and a wholesale business.

The appellees have combined and conspired to fix and control the price to consumers in the State of Washing-

ton of all Chrysler replacement parts and engines. They have succeeded in effectuating this conspiracy, with the result that prices of parts and engines have been raised four times during the two-year period covered by the indictment, an increase in the cost of such parts and engines to consumers in excess of $1,000,000.

Summary of the Indictment

The indictment, which appears in the record at p. 3, may be summarized as follows:

Paragraphs 1 through 5 identify and describe the five corporate defendants, the individual defendants (each of whom is an officer or manager of one of the corporate defendants), and the two defendant trade associations.

Paragraphs 6 through 11 describe the nature of the trade and commerce which is the subject of the price fixing agreement. It is pointed out that replacement parts and engines used in the repair of Chrysler, DeSoto, Dodge and Plymouth automobiles and trucks are manufactured by Chrysler Corporation in factories outside the State of Washington. The five corporate defendants are the only authorized wholesalers of Chrysler parts and engines located within the State of Washington. These companies are independent entrepreneurs engaged in purchasing parts and engines from Chrysler plants outside the state, bringing them into the State of Washington, and distributing them at both wholesale and retail levels. It is alleged in paragraph 10 that the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from Chrysler plants in other states for the purpose of filling two distinct needs.

First, drawing upon past sales experience, these companies anticipate probable sales in the immediate future and have parts and engines regularly coming in from

out-of-state plants so as to meet dealer and consumer demands as they arise.

Second, in response to orders already on hand from dealers and consumers, defendant corporations procure shipments from Chrysler plants outside the state of parts or engines, which are intended exclusively for specific dealers or consumers, and are delivered to them upon arrival at defendants' places of business.

It is alleged that the defendant wholesalers thus serve as a conduit through which Chrysler replacement parts and engines move in regular, continuous and uninterrupted flow from out-of-state plants to the ultimate users of said parts and engines in the State of Washington. More than 90% of the Chrysler replacement parts and engines used in the State of Washington, having a dollar value of more than $9,000,000 in the two-year period covered by the indictment, were sold at wholesale or retail by the corporate defendants (pars. 10, 11).

Beginning with paragraph 12, the alleged conspiracy is set forth in detail. The defendants are charged with having entered into an unlawful combination and conspiracy to fix, maintain and control prices and discounts applicable to the sale within the State of Washington of Chrysler Corporation replacement parts and engines produced in other states, in unreasonable restraint of interstate commerce and in violation of Section 1 of the Sherman Act.

Paragraph 13 enumerates the terms of the agreement, namely, that defendants agreed to:

1. Raise the prices of replacement parts and engines;

2. Decrease discounts granted in the sale of parts and engines;

3. Adhere to the prices and discounts agreed upon;

4. Induce and compel authorized Chrysler dealers, to whom they sell parts and engines, to adhere to the agreed-upon prices and discounts.

After describing the alleged unlawful price-fixing conspiracy, the indictment proceeds to set forth specific overt acts done by the defendants in carrying out the purposes of the illegal conspiracy. Four separate price increases on parts or engines made effective by corporate defendants during the period November 1946 through July 1948 are identified by the date when the increase was put into effect, the amount of the increase, the area in which the increase was made effective, and the efforts of defendants to bring Chrysler Corporation dealers into line with the agreed-upon increases (pars. 15, 17, 18, 20). The organization by the corporate and individual defendants of the defendant trade associations, MoPar Club and Parts Wholesalers' Association, and their use as instrumentalities for fixing, maintaining and controlling prices is also described.

Paragraph 21 describes the effects of the combination and conspiracy, both upon interstate commerce and upon consumers within the State of Washington. It is alleged that defendants increased their gross profit margin on Class A parts from 66 per cent to more than 74 per cent; on Class B parts from 50 per cent to more than 87 per cent in western Washington, and from 50 per cent to 65 per cent in eastern Washington; and on engines from 25 per cent to 40 per cent, with a resulting increase in the cost of replacement parts and engines to purchasers thereof in excess of $1,000,000 during the two-year period of the indictment. It is further alleged that the elimination of price competition and the substantial increase in prices pursuant to the conspiracy was intended to and did unreasonably burden and restrain the flow of replacement parts and engines in

interstate commerce from Chrysler plants in other states into the State of Washington.

Paragraph 22 sets forth appropriate allegations of overt acts within the Western District of Washington, Northern Division, to establish jurisdiction and venue.

Proceedings Below

The defendants filed motions to dismiss the indictment, asserting, *inter alia,* that the indictment fails to charge a crime, that it fails to allege facts constituting the offense, and that the indictment is defective because duplicitous, and because vague and indefinite (R. 17).

Following argument and the presentation of briefs, the District Court, on March 9, 1949, issued an order granting all of the defendants' motions and dismissing the indictment. Judge Driver rendered an oral opinion as follows (R. 22):

Opinion of the District Court

> Well, the Court isn't assuming one way or the other that this is a test case. I don't know what the government's intentions may be. The grand jury has indicted the defendants, and the Court will pass on this indictment in the light of the law as I see it, without regard to whether or not it is a test case. I'm not going to attempt any comprehensive review of the arguments made here; the question has been fully presented, but I'm, on either phase of this argument, or this question, rather, unable to distinguish the activities outlined in this indictment from the activities of an ordinary wholesaler, or on the question of whether it affects—whether the activities affected interstate commerce, I'm unable to distinguish it from the ordinary intrastate price fixing arrangement, and I don't believe that the court, that the Supreme Court or any Court of Appeals so far as I have been able to determine have gone quite as far as this indictment goes. I can't believe, as I see it, despite what we all know has happened so far as extending the reach of the inter-

state commerce power of Congress in recent years. I don't believe the Courts have gone to the position where you can say that every price fixing arrangement, purely intrastate, affects interstate commerce because of that circumstance alone, and I don't believe that any of the courts have gone so far as to hold that ordinary and usual and normal wholesalers' operations constitute activities in interstate commerce.

I really feel that because of the, at least the closeness of this question, that it should be passed upon by an appellate court before there is a jury trial. I think the Court would be in a better position to rule on questions of evidence and instruct the jury if I knew, if this indictment is to be upheld, on what theory it is upheld, and if it is upheld only as to those activities that represent specific orders for particular customers if that is alleged here, or whether the appellate court regards the whole operation as in interstate commerce or affecting interstate commerce.

I was impressed by Mr. Griffin's analysis of this paragraph 10. It seems to me that reading it in the light of other allegations in the indictment here, it does no more than simply allege that these defendants in the State of Washington as wholesalers were ordering, as an ordinary wholesaler does, in anticipation of orders and contracts, and in response to orders and contracts, and that they weren't ordering as agents of Chrysler, but they were buying and selling again, that that is a completed transaction; they bought the goods, and it was shipped in there; they would pass then, I think from interstate to intrastate commerce, and the succeeding sale would be intrastate commerce.

Now, if I'm wrong, it won't be the first time, and no doubt not the last, but I'm going to grant the motions, and you may send the order to me, I presume, to Spokane, because it won't be complicated at all, and there isn't any bail up in this case, is there? Well, I'll sustain the motions and direct that the action be dismissed.

QUESTIONS PRESENTED

1. Whether a conspiracy between all the wholesalers in the State of Washington, their officers, and two trade associations, to fix prices to consumers of Chrysler-made parts and engines all of which are purchased outside of the state, is a restraint of commerce within the scope of the Sherman Act.

2. Whether the indictment is sufficient as a pleading.

a. Whether the indictment charges a crime.

b. Whether the indictment alleges facts constituting a violation of the Sherman Act.

c. Whether the indictment is fatally duplicitous.

d. Whether the indictment is fatally vague and indefinite.

SPECIFICATION OF ERRORS

1. The district court erred in holding that the allegations of the indictment do not set forth a combination or conspiracy in restraint of interstate, as distinguished from intrastate, trade and commerce.

2. The district court erred in so far as it held that, under the allegations of the indictment, the defendant wholesalers are not engaged in interstate activity when they sell to customers within the State of Washington goods which the defendant wholesalers have purchased and procured from outside the State of Washington in response to prior orders from such customers.

3. The district court erred in ignoring, or in failing to give effect to, the allegation of paragraph 10 of the indictment that the "corporate defendants, and authorized Chrysler dealers in the State of Washington to whom they sell, serve as a conduit through which said Chrysler replacement parts and engines move in a regular, continuous, and uninterrupted flow to the ultimate users of said parts and engines in the State of Washington."

4. The district court erred in so far as it held that, under all the allegations of the indictment, the purchase by the defendant wholesalers of Chrysler parts and engines from plants located outside the State of Washington and the sale by the said wholesalers of such parts and engines to purchasers within the State are separate, completed transactions so insulated from each other that defendants' combination and conspiracy to fix, maintain and control prices and discounts applicable to such sales does not burden and restrain the interstate purchase and procurement of said parts and engines.

5. The district court erred in ignoring, or in failing to give effect to, the allegation of paragraph 21 of the indictment that the purpose, intent and necessary effect of the combination and conspiracy charged in the indictment has been and is to directly, substantially and unreasonably burden and restrain the flow in interstate commerce of Chrysler replacement parts and engines from states other than Washington to the State of Washington.

SUMMARY OF ARGUMENT

I

Appellees' conspiracy to fix consumer prices for Chrysler parts and engines purchased outside of the State of Washington is in illegal restraint of interstate commerce. It is settled that such a price fixing combination is an illegal restraint of trade *per se, United States* v. *Socony-Vacuum Co.,* 310 U. S. 150. Under the circumstances of this case, the restraint is *in* and *affecting* interstate commerce within the scope of the antitrust laws. The Sherman Act exercises the full constitutional power of the commerce clause, *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 298. In asserting that their activities are not subject to federal regulation, appellees ignore the realities of our integrated

national economy, *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.,* 301 U. S. 1, 41. The automobile industry, one of the nation's largest, is an interstate industry upon which all sections of the country are dependent. Parts for the maintenance of automobiles are an integral portion of this industry and move in interstate trade. A restraint on this industry, whether in the production, transportation, or distribution of its products, is within the federal power to control.

First, appellees' conspiracy to fix consumer prices of Chrysler parts is a restraint *in* interstate commerce. They purchase goods in other states and resell to consumers within the state at fixed prices. These sales are both in response to prior orders of customers and in anticipation of future orders. The distribution of these goods is as essential a part of their interstate movement as the production of them, and control of their sale prices in the state of destination restrains this commerce, *Local 167* v. *United States,* 291 U. S. 293, 297. Consumer sales cannot be amputated from the entire series of interstate transactions. Commerce in these parts must be viewed as an integrated whole. *United States* v. *General Motors Corp.,* (C.C.A. 7, 1941) 121 F. (2d) 376, cert. den. 314 U. S. 618. Even under those cases interpreting the Fair Labor Standards Act, a statute of more limited scope, appellees' restraint is in commerce, for the goods upon which prices were fixed were received from other states to fill prior orders and the anticipated requirements of stable customers. *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564; *Federal Trade Commission* v. *Pacific Paper Ass'n,* 273 U. S. 52. In *United States* v. *General Motors Corp., supra,* the Court stated that the interstate commerce in automobiles is "that from the manufacturer, through the dealers, to the ultimate consumer."

Second, appellees' conspiracy comes within the provisions of the Sherman Act even if it is not deemed to be in commerce itself, for the Act encompasses all restraints which affect interstate commerce. Purely local activities are subject to regulation if they injuriously affect interstate commerce. *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110; *United States* v. *Women's Sportswear Manufacturers Ass'n,* 336 U. S. 460. This Court, in *Food and Grocery Bureau* v. *United States,* 139 F. (2d) 573 (1943), held a conspiracy to fix retail grocery prices in California to be a violation of the Sherman Act. The same type of restraint has been imposed in the case at bar. Businesses similar to those restrained and conducted by appellees often have been held subject to federal regulation under the commerce clause in cases involving the National Labor Relations Act, a statute having coverage comparable to the Sherman Act. This Court in *N.L.R.B.* v. *Van De Kamp's, etc., Bakers,* 152 F. (2d) 818 (1946), determined commerce to be affected in the case of a bakery purchasing 30% of its materials outside the state, and selling all of its products within the state. To the same effect is the decision of this Court in *N.L.R.B.* v. *Ellis-Klatscher & Co.,* 142 F. (2d) 356 (1944). In the light of the decisions of the last fifteen years and of any realistic understanding of our national economy, the conclusion is inevitable that appellees have conspired to impose a restraint which affects interstate commerce within the meaning of the Sherman Act.

II

The indictment is sufficient as a pleading in charging, clearly and specifically, a conspiracy in violation of the Sherman Act. It amply informs the appellees of the nature of the charge, as provided by Rule 7(c) of the Federal Rules of Criminal Procedure. *United States* v.

Achtner, 144 F. (2d) 49 (C.C.A. 2, 1944); *United States* v. *American Medical Ass'n.,* 110 F. (2d) 703 (App. D. C., 1940), cert. den. 310 U. S. 644. The plain language of the indictment permits of no misunderstanding of the crime charged, and of when and how appellees are alleged to have carried it out. The conspiracy is described specifically as a concert of action among the appellees to fix prices for the sale to consumers of Chrysler replacement parts and engines by the appellee wholesalers, as well as to compel and induce the dealers to whom they also sold to maintain the identical fixed prices in consumer sales. The indictment names dates on which agreements were reached to raise prices on parts and engines, specifies the amounts of the increases, and alleges that uniform price lists were sent to dealers. The dates of organizing the appellee trade associations are specified, and their activities, through which the conspiracy was effectuated, are described. This recitation of facts leaves no possibility of misunderstanding as to the conspiracy charged. Indeed, it goes further than required, for conspiracies under the Sherman Act may be alleged with less particularity than is required in an indictment for other types of criminal conspiracy. *Nash* v. *United States,* 229 U. S. 373, 378; *Eastern States Lumber Ass'n.* v. *United States,* 234 U. S. 600, 612.

The indictment charges but one offense—the conspiracy to fix consumer prices of these goods. The addition of descriptive facts regarding the means used to commit the offense assists appellees in identifying it. *Silkworth* v. *United States,* 10 F. (2d) 711 (C.C.A. 2, 1926), cert. denied, 271 U. S. 664.

The indictment is as specific and definite as the circumstances permit and the law requires. Less definite indictments have been sustained often. *United States* v. *Frankfort Distilleries,* 144 F. (2d) 824 (C.C.A. 10,

1944), partly reversed on another question, 324 U. S. 293, certiorari denied as to this question *sub nom. Safeway Stores, Inc.* v. *United States,* 323 U. S. 768. *United States* v. *Tarpon Springs Sponge Exchange,* 142 F. (2d) 125 (C.C.A. 5, 1944).

ARGUMENT

I

Appellees' Conspiracy to Fix Consumer Prices for Chrysler Parts and Engines Shipped Into Washington from Other States Is in Illegal Restraint of Interstate Commerce

The five corporate appellees are all of the wholesalers in Washington of replacement parts and engines for Plymouth, Dodge, DeSoto and Chrysler automobiles. They purchase all such parts and engines from Chrysler manufacturing subsidiaries in other states. They handle 90 percent of the business in these items within the State of Washington. They sell both to consumers and to dealers who, in turn, sell to customers.

These wholesalers, their officers, and the two trade associations which are their creatures have combined and conspired to fix and raise the prices to consumers of these parts and engines. That this conspiracy succeeded is reflected in the fact that consumer prices for these items were raised four times during the period covered by the indictment, resulting in a cost to the consumers in the State of Washington of more than $1,000,000.

It is settled that a conspiracy to fix prices is an unreasonable restraint of trade *per se. United States* v. *Trenton Potteries Co.,* 273 U. S. 392; *United States* v. *Socony-Vacuum Co.,* 310 U. S. 150. None the less appellees contend, and the Court below held, that this price-fixing combination is so remote in its operation and effect upon interstate commerce as to be beyond the scope of Congressional authority acting to the full limit

of the Commerce Clause. We submit that this contention is plainly without merit and unsupported by any decision of the Supreme Court within recent years. We will discuss subsequently the precedents and principles applicable in demonstrating that appellees' conduct has such an impact upon interstate commerce as to bring it within the reach of the Commerce Clause as applied through the Sherman Antitrust Act. But at the outset we would like to emphasize that appellees' contention ignores the realities of our integrated national economy and the mutual dependency of all parts of the country for these products.

These parts and engines are not only an integral part of the automobile industry, but are intimately connected with and essential to the continued maintenance of Chrysler automobiles, one of the three largest of such manufacturers. Automobiles made in Detroit are distributed and used in the farthest reaches of the country. Parts for the maintenance of these automobiles follow also in the channels of interstate commerce. Those involved in this litigation happen to have been manufactured in Michigan, Georgia, Kansas, Delaware, and California. If this flow is throttled, whether at the outset of its journey by cutting down production, while it is in transit by impeding its movement, or at its destination by restricting its distribution, the effect, without question, is upon interstate commerce primarily and immediately. It is against all reason to assert that a small group in one state has the power by a concerted fixing of prices to regulate the market for products of such an integrated national industry. "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant fac-

tor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce . . .'' *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation,* 301 U. S. 1, 41-42. These comments are equally applicable to the price-fixing restraint created by appellees.

By conspiring to fix the prices on these Chrysler parts appellees place an impediment in the way of their free distribution to the consumer market. Their control over these goods is as effective as that of a man holding the nozzle of a garden hose. By applying some pressure with his thumb, less water escapes, and if he applies enough pressure he can stop the flow as readily as turning off the faucet. Similarly, the actions of appellees put reverse pressure on the flow of goods through the channels of interstate trade, with an impact directly back to the manufacturer and harmful effect on the industry as a whole.

The scope of the Sherman Act is that of the commerce clause itself. ''With reference to commercial trade restraints such as [the act reaches], Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' '' *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 298; *United States* v. *Southeastern Underwriters Association,* 322 U. S. 533, 558-559. Thus, the question here presented is, at bottom, not merely the construction of a statute but whether, acting to the extent of its constitutional power, the Federal Government can reach a conspiracy to fix prices to consumers of goods which are produced outside of the state and shipped to the conspirators in the state. It is settled that the scope of the Sherman Act does not depend upon whether the restraint occurs ''in'' interstate commerce

or whether, while not "in" interstate commerce, it "affects" interstate commerce to a sufficient extent to subject it to the Federal authority. The Sherman Act is broad enough to include both restraints in commerce and restraints affecting commerce. It suffices that either situation be demonstrated. It is the Government's view that this combination to fix consumer prices falls within both definitions, and that the restraint not only has affected interstate commerce substantially, but also is a restraint in interstate commerce itself.

A. *Appellees' conspiracy to fix consumer prices of Chrysler parts is a restraint in interstate commerce*

The corporate appellees purchased these Chrysler parts outside the State of Washington, and received them within the State of Washington upon shipment across the state line. It will be noted that they engaged in two types of sales: to consumers, at the prices fixed by their conspiracy, and second, to retail Chrysler dealers at unfixed prices. The dealers, in turn, sell to consumers at the prices fixed identically by appellees' conspiracy.

Again, the corporate wholesalers purchased from their out-of-state suppliers under two circumstances: first, they purchased in response to orders and demands from customers, and second, they purchased in anticipation of orders and demands of customers. The plain and indisputable meaning of "in response to orders and demands from customers" is that these wholesalers were undertaking to fill prior orders which they had on their books. The meaning of "in anticipation of orders and demands from customers" is necessarily predicated upon an anticipated and calculated market for the goods.

Arguendo, we may concede that the conspiracy itself is local in the sense that it was entered into between persons located within the state, and that the prices fixed on the goods were for the sale to local consumers. The geographical location of these two factors is of no legal effect in determining the scope of the Sherman Act. The conspiracy projects itself in interstate commerce whether or not the conspirators are situated intrastate, and the price imposed on the goods, as a result of the conspiracy, is imposed during their interstate journey even though it is the local consumers who pay.

Appellees' attempt to truncate the interrelated elements of a great interstate industry is supported by neither law nor logic. The interstate aspect of commerce in Chrysler parts encompasses production, transportation, and distribution. Distribution, at one end of this process, is as essential an element as production at the other, for, if distribution is clogged, the manufacturer will reduce output and the railroads carry less goods. By restraining the market for parts and engines in one state, appellees have slowed, and stopped in part, this interstate movement.

These appellees have created a price barrier over which the goods must climb in order to reach the consumer market. Four times they have raised the barrier so that the climb has become increasingly more difficult.[1] And this price barrier is attached to the goods directly they come into the hands of the corporate wholesalers, who receive them by interstate purchase, for as soon as received they are bound by the terms of the conspiracy.

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[1] Appellees' conspiracy is, of course, equally invalid whether it had the effect of raising or lowering prices. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 48. The Sherman Act provided that competition should be the law of business, and the Act will not be judicially repealed by any assertion that trade-restraining practices produce economic benefits. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221; *United States* v. *Union Pacific R. Co.,* 226 U.S. 61.

The parts cannot move on from these wholesalers to the consumer except by carrying the added burden of this indenture. It is thus clear that this price burden—the very product of the illegal conspiracy—is attached to the goods while they are actually in interstate commerce. As soon as the parts are received by the wholesaler in the course of the interstate journey, they are subjected to this restriction imposed on the onward movement to consumers. In a practical business sense, this restraint operates as more than a price restriction imposed on the goods while they travel from manufacturer to consumer. It also operates as a prior restraint on the commerce before the goods are shipped or even purchased. For, having entered into this conspiracy to fix consumer prices on all future purchases, the appellees can make no purchases in other states that are not subjected, in advance, to this restriction. When appellees go to the foreign vendor to negotiate, their purchases are limited in advance by the requirement of a fixed price on resale to consumers. Such a purchaser does not enter the market-place as a free trader, and the resultant regimentation of out-of-state purchases by the appellee wholesalers is clear.

The trade of shippers of such products was clearly restrained when, by reason of the conspiracy, these shippers were compelled to sell in a market in which resale price competition among the purchasers of their goods was wholly or partially suppressed. *Local 167* v. *United States,* 291 U. S. 293, 297; *Swift & Co.* v. *United States,* 196 U. S. 375, 398. Similar facts have been held to support a finding of restraint of interstate commerce. *Federal Trade Commission* v. *Pacific States Paper Trade Assn.,* 273 U. S. 52. In the *Local 167* case, the Supreme Court said (291 U. S. at p. 297):

> The control of the handling, the sales and the prices at the place of origin before the interstate

> journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. * * *.

"Commerce among the states," said Mr. Justice Holmes, "is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States,* 196 U. S. 375, 398; *United States* v. *Yellow Cab Company,* 332 U. S. 218. Any attempt to separate the sale of parts and engines at wholesale or retail from the entire chain of commerce from Chrysler Corporation plants in other states to retail outlets and to consumers in the State of Washington would be patently artificial and unrealistic. As the Supreme Court stated in *United States* v. *Southeastern Underwriters Ass'n,* 322 U. S. 533, at page 537:

> True, many of the activities described in the indictment which constituted this chain of events might, if conceptually separated from that from which they are inseparable, be regarded as wholly local. But the District Court in considering the indictment did not attempt such a metaphysical separation.

In *United States* v. *General Motors Corp.,* 121 F. (2d) 376 (C. C. A. 7, 1941), cert. denied, 314 U. S. 618, another conspiracy affecting interstate commerce by restraining retail sales was found to be a violation of the Sherman Act. The object of the conspiracy was to induce dealers to require their retail customers to finance their purchases of automobiles through General Motors Acceptance Corporation. The Government rested its case on the theory that the restraint was on the sales of automobiles. At that time new cars were bought in quantity by dealers and sold from stock (*Id.* at 387-388). Commenting on the argument that the commerce restrained was the retail sale, the Court stated:

> Now it is quite impossible to consider the interdependent retail market and the wholesale market as one apart from the other, for obviously without the retail sale there could be no wholesale transaction. Any restraints which affect the wholesale market must be reflected in the retail sales and, likewise, any restraints affecting the retail market necessarily affect the wholesale transactions. (p. 398)
>
> The true perspective is to be drawn from the whole picture, and the interstate commerce involved in this case is that from the manufacturer, through the dealers, to the ultimate consumer. Even assuming that the only interstate commerce involved is the movement of cars from the factory to the dealers, a restraint imposed upon the movement of cars from the dealers to the retail public would necessarily affect the shipment and movement of the cars while unquestionably they are in interstate commerce, and consequently we need not really decide when the interstate commerce ends and that which is intrastate commerce begins. (pp. 401-402)

In *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52, similar transactions were held to be in interstate commerce. In that case wholesalers, in response to orders from customers, ordered paper from a mill. The wholesaler paid for the goods and received the bill of lading; there were no contractual relations between his customer and the mill. The shipment from the mill was sometimes consigned to the wholesaler, who took possession of the goods and later delivered to his customer, and sometimes consigned to the customer, in which case the customer took delivery. The Court held that in either event the transactions were *in* interstate commerce. It was said to be immaterial whether the goods were delivered to the wholesaler or his customer. In all instances, the relations between the wholesaler and his customer occurred within one state; further, the wholesaler was free to supply goods from a mill out-

side of the state, or from one inside. When he elected to order from a mill outside of the state, the sale by the wholesaler to his customer became a part of interstate commerce.

It should be noted that in the *Pacific Paper* case, not only was the commerce involved like that in the present case, but the restraint applied thereto was identical—fixing the price in the transaction between the wholesaler and his customer.

A significant comparison is found in those cases arising under the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 201). That statute is of considerably narrower scope than the Sherman Act, since it covers only employment "in" interstate commerce and in production for commerce, not the entire field of the Federal commerce power.

In *Walling* v. *Jacksonville Paper Company,* 317 U. S. 564, the respondent was engaged in the wholesale paper business, purchasing most of its paper from mills outside the state and reselling to customers within the state. As in the *Pacific Paper* case, two separate contracts existed and there were no business relations whatever between the wholesaler's customer and the mill. In both cases, as in the present case, the transaction between the wholesaler and his customer occurred entirely within one state. The Court in the *Jacksonville* case ruled that paper purchased to fill a special order of a customer or to meet the particular needs of specified customers was in interstate commerce although there was a "temporary holding of the goods" at the respondent's warehouse. The Court held that employees handling such goods were engaged "in commerce" although the goods were unloaded at the wholesaler's warehouse and temporarily held before being sent on to the customer. The Court said (p. 569):

> The fact that respondent may treat the goods as stock in trade or the circumstance that title to the

> goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate.

Other cases holding that handling and delivering goods received from other states to fill prior orders or the anticipated requirements of stable customers constitute engaging in commerce, within the meaning of the Fair Labor Standards Act, are *Walling* v. *Mutual Wholesale Food & Supply Company,* 141 F. (2d) 331 (C.C.A. 8, 1944); *Mid-Continent Petroleum Corp.* v. *Keen,* 157 F. (2d) 310, 314 (C.C.A. 8, 1946); *Walling* v. *American Stores Company,* 133 F. (2d) 840, 845-846 (C.C.A. 3, 1942); *A. H. Phillips, Inc.* v. *Walling,* 144 F. (2d) 102, 104 (C.C.A. 1, 1944); *Montgomery Ward & Company* v. *Antis,* 158 F. (2d) 948, 951-952 (C.C.A. 6, 1947); and cf. *Walling* v. *Goldblatt Brothers,* 152 F. (2d) 475, 477 (C.C.A. 7, 1945), cert. denied, 328 U. S. 854.

Even under the narrow doctrine of these Fair Labor Standards Act decisions, it is settled that the Chrysler parts and engines that have been purchased by appellee wholesalers "in response to orders" remain in commerce until delivered to the consumer. In addition, the goods purchased to fill anticipated demands of stable customers who create a steady market are within the same category. In view of the fact that this result was reached under statutes much narrower in their coverage than the Sherman Act, it necessarily follows that the business conducted by the corporate appellees, upon which this restraint was imposed, is interstate commerce within the meaning of the antitrust laws.

B. *Appellees' conspiracy to fix consumer prices of Chrysler parts affects interstate commerce within the meaning of the Sherman Act*

As we have pointed out above, it is not necessary that the restraint be in commerce itself for appellees' conspiracy to come within the provisions of the Act. Appellees are brought within the statute if their actions affect that commerce which is protected by the constitutional authority.

It has long been settled that purely local activities are subject to regulation, even though the practices concern intrastate commerce and "no part of the product is intended for interstate commerce or intermingled with the subjects thereof." *Wickard* v. *Filburn,* 317 U. S. 111, at 120. As was stated in a recent opinion of the Supreme Court, *United States* v. *Women's Sportswear Manufacturers Association,* 336 U. S. 460, at 464:

> The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

In *United States* v. *Wrightwood Dairy Company,* 315 U. S. 110, marketing orders fixing minimum prices to producers of milk, pursuant to the Agricultural Marketing Agreement Act, were held applicable to a pro-

ducer of milk all of which was produced, processed, and sold within a state. The Court stated (pp. 119-121):

> The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.
>
> Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce. *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Swift & Co.* v. *United States,* 196 U. S. 375; *United States* v. *Patten,* 226 U. S. 525; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Local 167* v. *United States,* 291 U. S. 293; *Stevens Co.* v. *Foster & Kleiser Co.,* 311 U. S. 255. So too the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional regulation of the intrastate activity. It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power. Cf. *Shreveport Case, supra; Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co., supra; National Labor Relations Board* v. *Jones & Laughlin Corp.,* 301 U. S. 1, 36-43; *United States* v. *Darby, supra,* 122.

And in *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219, a treble damage action involving price fixing by local purchasers of beets from the farmer, the Court stated (p. 234) ". . . given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the effect is sufficiently substantial and ad-

verse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall . . ."

These principles have been applied by this Court many times. Two recent decisions which, we believe, are determinative of the case at bar, are *Food and Grocery Bureau of Southern California* v. *United States,* 139 F. (2d) 973 (C.C.A. 9, 1943) and its companion case, *California Retail Grocers & Merchants Association* v. *United States,* 139 F. (2d) 978, cert. denied, 322 U. S. 729. These cases concerned a conspiracy, through a trade association, to fix retail prices of food and groceries in California. This Court quoted with approval the statement of the Supreme Court in *Local No. 167* v. *United States,* 291 U. S. 293, 297, that "the control of prices 'in the state of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce' " (139 F. (2d) 978) and stated that "agreements stabilizing such prices either at a maximum or a minimum or through a formula violate the Sherman Act." The purpose and effect of the conspiracy in the case at bar is identical with that in these food cases. The fact that in the food cases the attempt was made to enforce the price restrictions upon out-of-state vendors is of no significance. As we have pointed out above, the physical location of the conspirators does not determine whether the restraint is prohibited under the Sherman Act. The question is solely as to the effect of the restraint, and, in both the food cases and the instant case the effect of the restraint is to fix and control prices to consumers. In both situations such an illegal price-fixing arrangement has an immediate adverse effect upon the market for goods moving in interstate commerce. In addition there is the ever-present factor of competition between those parts which are not exclusively usable on Chrysler cars, and those of other manufacturers. Clearly, the deci-

sions of this Court in the food cases are completely dispositive of the issues now before the Court. In passing, we should like to add that the indictment in the *Food & Grocery Bureau* case was substantially identical with that now before the Court, and a motion to dismiss was overruled by the District Court for the Southern District of California (41 F. Supp. 884).

The scope of the power to regulate commerce under the Sherman Act is coextensive with that under the National Labor Relations Act (29 U.S.C. 151), since the latter statute, also, exercises the full scope of the commerce clause. It has long been settled that the jurisdiction of the National Labor Relations Board, under the commerce power, extends to businesses and conduct such as appellees'. In *N.L.R.B.* v. *Kudile,* 130 F. (2d) 615 (C.C.A. 3, 1942), the Court held that a dairy company which purchased a large part of its products outside of the state but sold all of them within the state is subject to the Federal statute, notwithstanding the argument that, since all of its sales were intrastate, the company was beyond the scope of Federal jurisdiction. Similarly, the Court of Appeals for the Fourth Circuit in 1942, in *N.L.R.B.* v. *Robert S. Green, Inc.,* 125 F. (2d) 485, ruled that a Maryland corporation engaged in the building supply business was within the jurisdiction of the Board because it purchased the majority of its supplies outside the state. The corporation sold less than 1% of its goods outside of Maryland, and the Court stated that it would not consider whether jurisdiction could be based on these sales, since it existed on the basis of the corporation's interstate purchases alone. "Whether the sales to points outside of Maryland are sufficient in amount to furnish a basis of jurisdiction for the Board's action we need not decide, since we think that such basis unquestionably exists with respect to shipments made to respondent from without the state."

In *N.L.R.B.* v. *Suburban Lumber Company,* 121 F. (2d) 829 (C.C.A. 3, 1941), the Court held that a retail lumber dealer which purchased $150,000 in lumber from other states and made 1% of its sales outside the state, was engaged in a business affecting interstate commerce. The Court based its decision on the dealer's out-of-state purchases, and made the following interesting comments in comparing the scope of the Sherman Act (p. 832):

> In this view, percentages and such mathematical formulae are manifestly irrelevant except possibly in one respect. Using the commonly accepted watercourse metaphor, a thimble affects a brook, a bucket affects a stream and a spillway affects a river . . .
> . . . Certainly no average sized retailer could escape the operation of the Sherman Anti-Trust Act on the ground that the effect of its restraint upon interstate commerce was not substantial. If the Suburban combined with other retailers in the restraint of trade, there can be no question but that Suburban would be liable to prosecution under the Sherman Act. While it is true that the conspiracy or combination would be the element which would render the Suburban criminally or civilly liable, Federal jurisdiction would be conferred solely because Suburban's individual restraint substantially burdened interstate commerce . . .

The Court continued by quoting the following passages from comment and decision to illustrate the principle applied (121 F. (2d) 833):

> For the same reasons, the act would seem to embrace a third type of business—companies which receive a large proportion of the materials needed for production or for distribution from other states, but which sell practically all of their goods to local or intrastate purchasers. * * * Certainly, labor difficulties occurring at this stage of commercial

intercourse may burden the free flow of commerce among the states just as effectively as those arising at its source. The Court itself took this position when it said "the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial." Mueller, *Businesses Subject To The National Labor Relations Act,* 35 Michigan Law Review 1286, 1294-1296.

And it has been held in one case: "There can be no difference in principle between the case in which manufacture precedes and that in which it follows interstate commerce. If the flow of commerce is obstructed by labor disputes, it can make no difference from which direction the obstruction is applied." *Newport News Shipbuilding & Dry Dock Co.* v. *N.L.R.B.,* 4 Cir., 101 F. (2d) 841, 843.

To revert to our watercourse metaphor, the thimble, the bucket and the spillway remove just as much water no matter at what part of the brook, stream or river they are applied.

Similarly, the Courts have upheld the Labor Board's jurisdiction over retail establishments, such as department stores, which purchase substantial amounts of goods out of the state. *N.L.R.B.* v. *J. L. Hudson Company,* 135 F. (2d) 380 (C.C.A. 6, 1943), cert. denied, 320 U. S. 740 (80% of merchandise purchased out-of-state, 1.6% of sales out-of-state); *J. L. Brandeis & Sons* v. *N.L.R.B.,* 142 F. (2d) 977 (C.C.A. 8, 1944), cert. denied, 323 U. S. 751, rehearing denied, 323 U. S. 815 (75% of purchases outside of state, .0024% of sales outside of state); *N.L.R.B.* v. *May Department Stores Company,* 146 F. (2d) 66 (C.C.A. 8, 1944), affirmed 326 U. S. 376, rehearing denied, 326 U. S. 811 (70% of purchases outside of state, 12% of sales outside of state). This Court, in 1944, likewise held that a wholesaler of variety store merchandise, 65% of whose purchases were made outside of the state, and approximately 3% of whose sales were made outside of the state, was subject to the juris-

diction of the Labor Board, *N.L.R.B.* v. *Ellis-Klatscher & Company,* 142 F. (2d) 356, and in *N.L.R.B.* v. *Van DeKamp's, etc. Bakers,* 152 F. (2d) 818 (1946), this Court held commerce to be affected in the case of a bakery purchasing 30% of its materials outside the state and selling all of its products within the state. These cases are based upon the principles established by the Supreme Court in *N.L.R.B.* v. *Fainblatt,* 306 U. S. 601, *N.L.R.B.* v. *Bradford Dyeing Association,* 310 U. S. 318, and similar cases. Without discussing in detail these decisions involving retail and wholesale merchandising businesses, it is clear that, under the principles expressed in the opinions, the determination by the Courts that commerce was affected is not dependent upon whether any interstate sales are made by these businesses, but rather is grounded upon the more basic principle that the nature and scope of the business, as demonstrated by extensive out-of-state purchases, is so intimately connected with commerce as to bring it within the Federal power.[2] Cf. *United States* v. *Moun-*

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[2] The Supreme Court has rejected the use of the term "direct" or "indirect" as a rule-of-thumb in determining effect on commerce. As early as *Carter* v. *Carter Coal Co.,* 298 U.S. 238, Mr. Justice Cardozo, in his dissent, criticized the term—". . . a great principle of constitutional law is not susceptible of comprehensive statement in an adjective." (298 U.S. 327). In *Santa Cruz Fruit Packing Co.* v. *N.L.R.B.,* 303 U.S. 453, the terminology was said merely to embody the distinction between "remote" and "close and substantial" a "criterion . . . necessarily one of degree" not susceptible of expression in "mathematical or rigid formulas" (303 U.S. 466-7). In *Wickard* v. *Filburn,* 317 U.S. 111, 122-23, Mr. Justice Jackson stated "In some cases sustaining the exercise of federal power over intrastate matters the term 'direct' was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonomous with 'substantial' or 'material'; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause." This "deliberate departure from the direct—indirect formula . . . was a healthy reversion to first principles, to the Constitution itself." Stern: *The Commerce Clause and the National Economy, 1933-1946,* 59 Harv. L. Rev. 645, 891.

tain States Lumber Dealers Association, 40 F. Supp. 460 (D. Colo., 1941).

In two cases reaching the Courts of Appeal, automobile dealers were held subject to the National Labor Relations Act. *N.L.R.B.* v. *Henry Levaur, Inc.,* 115 F. (2d) 105 (C.C.A. 1, 1940); *Williams Motor Company* v. *N.L.R.B.,* 128 F. (2d) 960 (C.C.A. 8, 1942). Both of these dealers made a substantial portion of their sales, as well as of their purchases, outside of the state, although the decisions did not turn on this point. In the *Williams* case, the Court said "it appears that the major part of petitioner's business was closely related to interstate commerce. The basis of its business was handling the Chrysler Corporation cars which came from Detroit." (128 F. (2d) 963). Following the principles so clearly laid down in the cases cited above, the National Labor Relations Board has consistently taken jurisdiction of business identical with those engaged in by appellees. See *Matter of M. L. Townsend,* 81 N.L.R.B. No. 122, 2 C.C.H. Labor Law Sv. ¶8656 (1949) (retail dealer in new automobiles, used automobiles, parts, and repair services, all of whose sales were made within the state and all of whose automobiles were purchased from wholesale distributors within the state). To the same effect are *Matter of Valley Truck & Tractor Company,* 80 N.L.R.B. 444, 2 C.C.H. Labor Law Sv. ¶8404 (1948); *Matter of Puritan Chevrolet, Inc.,* 76 N.L.R.B. 1243 (1948); *Matter of Liddon-White Truck Company,* 76 N.L.R.B. 1181 (1948). See also *Matter of Harry's Cadillac-Pontiac Company, Inc., et al.,* 81 N.L.R.B. 1 (1949), No. 34-RC-71 (not yet printed) (dealers in new automobiles, used automobiles, parts and accessories, all of whose sales were made within the state); and *Matter of Mid-Town Motors, et al.,* 80 N.L.R.B. 1679 (1948), No. 20-RC-141 (not yet printed) (involving eight retail dealers in new and used automobiles, parts,

and services, all of whom sold only within the state and some of whom made all purchases from wholesale automobile distributors within the state).

In the light of these decisions of the courts during the past fifteen years and of any realistic understanding of our national economy, the conclusion is inevitable that these appellees have conspired to impose a restraint which so affects interstate commerce as to fall within the federal power expressed in the Sherman Act. Appellees, dealers in automobile parts and engines manufactured and purchased outside of the state, an essential part of a great national industry, distributors of merchandise utilized throughout the country as the result of a far-flung and mutually dependent system of transportation and distribution, are surely within the reach of federal control under the commerce clause. For it is just such freedom from local impediments in our national economy that the commerce clause protects. Certainly the indictment alleges that such a restraint on commerce was created within the meaning of the statute, requiring, at the very least, a trial to determine whether these allegations will be sustained by the facts.

II

The Indictment Is Sufficient as a Pleading in Charging Clearly and Specifically a Conspiracy in Violation of the Sherman Act

The opinion of the District Court (*supra,* p. 6) does not disclose in what, if any, respect the indictment was found in fault as a matter of technical draftsmanship. The appellees have raised a number of objections. Since these appear in large part to be the product of the natural disinclination of an accused to concede any possible defense, we can discuss them only in the general terms in which they were raised.

The Federal Rules of Criminal Procedure require an indictment to be a "plain, concise, and definite written

statement of the essential facts constituting the offense charged." Rule 7(c). Under this rule, as controlled by Constitutional requirements, it has been held many times that an indictment is sufficient if it so informs the accused of the nature of the charge against him that he may prepare his defense and, where appropriate, later plead former jeopardy. *United States* v. *Achtner,* 144 F. (2d) 49 (C. C. A. 2, 1944); *United States* v. *American Medical Assn.,* 110 F. (2d) 703 (App. D. C., 1940), cert. denied, 310 U. S. 644; *Wilson* v. *United States,* 158 F. (2d) 659 (C. C. A. 5, 1947), cert. denied, 330 U. S. 850; *U. S.* v. *Armour & Co.,* 137 F. (2d) 269 (C. C. A. 10, 1943).

It is clear that the indictment, which is set forth in full at p. 3 of the record, conforms with these basic precepts. A normal and ordinary reading of the indictment informs the appellees of the crime charged, and of how, when, and where they are alleged to have carried it out. Paragraph 12 charges the appellees with conspiring to fix prices on Chrysler parts and engines in restraint of interstate commerce and in violation of the Sherman Act. The conspiracy is the crime. No further act is necessary for liability. *Nash* v. *United States,* 229 U. S. 373, 378, and the term "conspiracy" is the proper charge, *United States* v. *Armour & Company,* 137 F. (2d) 269, 270 (C. C. A. 10, 1943).

There is nothing vague or unidentifiable about the conspiracy charged. Appellees are able readily to identify the terms of the conspiracy, and even the actions which are alleged to have been the product of their combination. Paragraph 13 specifies that the conspiracy consisted of continuing agreement and concert of action among the appellees to fix prices for the sale to consumers of Chrysler replacement parts and engines by the appellee wholesalers, as well as to compel and induce the dealers to whom they also sold to maintain

the identical fixed prices in consumer sales. It can hardly be contended that the appellees are so naive as not to be cognizant of what conspiracy the indictment charges, on the basis of these allegations alone. But, if there were any doubt, the succeeding paragraphs are incapable of misinterpretation. Paragraph 15 alleges that on or about November 12, 1946 the appellees agreed to a price increase on parts and engines in western Washington, ranging from 5 to 15% as specified, and that appellees notified the dealers to whom they sold of these increases, furnishing them with computation tables of the new price lists. Paragraph 16 alleges that on or about November 1947 the appellees organized the Wholesalers Association, and that thereafter this Association was utilized as an instrumentality in furthering the conspiracy; that periodic meetings were held at which price information was exchanged and agreements reached for uniform prices. Paragraph 17 asserts that on or about January 8, 1948 appellees agreed upon an additional increase of 10% in the price of Class B parts to consumers, and a reduction in the discount on engines to certain classes of consumers. Again, appellees notified the dealers to whom they sold of the price changes and furnished computation tables so that there would be no miscalculation. Paragraph 18 alleges another concerted price increase, on or about March 1, 1948, ranging from 5 to 10% in the price to consumers. Paragraph 19 alleges that appellees organized on or about March 19, 1948 the MoPar Club, in which all corporate appellees except Riegel participated, and which was thereafter used, through meetings and exchange of information, as an instrumentality to effectuate the price-fixing conspiracy. Paragraph 20 alleges an additional increase of 5% on the price of engines sold to consumers, by concerted action of appellees on July 19, 1948. Again, appellees notified the

dealers to whom they sold, and furnished uniform price lists.

Surely, the appellees cannot seriously contend that they are not informed of the charge against them. Appellees must be aware of their actions in connection with price-fixing of the products with which they dealt on November 12, 1946, January 8, 1948, March 1, 1948 and July 19, 1948. Reference to the uniform price lists which, it is alleged, they drew up and had distributed, should refresh recollection of those events. Participation in the formation of the Wholesalers Association and the MoPar Club, as well as the activities conducted through those organizations in exchanging price information and establishing fixed prices, are not actions susceptible of an ambiguous interpretation.

We, therefore, believe it amply clear that any businessman, charged with the crime of conspiring to restrain trade in violation of the Sherman Act as amplified by such a series of descriptive facts, has been informed fully of the crime with which he is charged. While there may or may not remain questions of law, there can be no doubt in the appellees' minds as to what actions are challenged.

The indictment thus complies fully with the basic requirement that the accused be informed of the nature of the charge in order that he may prepare his defense. In fact, the indictment goes into greater detail in this respect than required, for conspiracy cases under the Sherman Act may be alleged with less particularity than is required in an indictment for other types of criminal conspiracy, since it is not necessary to allege the commission of an overt act, and such conspiracies are frequently established by inference from a course of conduct. *Nash* v. *United States,* 229 U. S. 373, 378; *Eastern States Lumber Association* v. *United States,* 234 U. S. 600, 612; *Interstate Circuit* v. *United States,*

306 U. S. 208, 226. Indictments substantially in the words of the statute have been upheld frequently in cases involving crimes other than antitrust violations. *United States* v. *Achtner, supra; United States* v. *Krepper,* 159 F. (2d) 958 (C. C. A. 3, 1946), cert. denied, 330 U. S. 824; *United States* v. *Martinez,* 73 F. Supp. 403 (M. D. Pa., 1947).

Although names, dates, and places have been included in the indictment in specifying the actions of appellees taken in furtherance of the conspiracy, the indictment charges but one offense. It is in one count, and charges only one conspiracy—the conspiracy to fix consumer prices of these goods. The descriptive allegations assist the appellees to identify the crime, and cannot be separated from the crime from which they stem. "It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole", *United States* v. *Patten,* 226 U. S. 525, 544. It is not duplicitous to allege the various means used in committing the offense. *Silkworth* v. *United States,* 10 F. (2d) 711 (C.C.A. 2, 1926), cert. denied, 271 U. S. 664.

We see no basis for the argument that the indictment is vague and indefinite. To the contrary, it is as specific and definite as the circumstances of the alleged crime permit. This objection has been raised frequently to Sherman Act indictments, and consistently rejected by the courts. *United States* v. *Frankfort Distilleries,* 144 F. (2d) 824 (C.C.A. 10, 1944); *United States* v. *Tarpon Springs Sponge Exchange,* 142 F. (2d) 125 (C.C.A. 5, 1944); *United States* v. *Armour & Co.,* 137 F. (2d) 269 (C.C.A. 10, 1943); *United States* v. *American Medical Assn.,* 110 F. (2d) 703 (App. D. C., 1940), cert. denied, 310 U. S. 644; *United States* v. *New York Great A. & P. Tea Co.,* 137 F. (2d) 459 (C.C.A. 5, 1943), cert. denied, 320 U. S. 783. In the *A. & P.* case the

Court, speaking of an indictment less concise and specific than the present one, remarked that "no one can read the indictment without understanding what is charged" (p. 462). It rejected a contention that the indictment contained mere conclusions as a "stereotyped complaint against indictments" (p. 463). These remarks fit the present case exactly. "In a conspiracy case it is not necessary to set out in detail the evidence of the conspiracy. Nor is it necessary to describe the conspiracy with the same degree of particularity as in describing a substantive offense." *Mercer* v. *United States,* 61 F. (2d) 97, 99 (C.C.A. 3, 1932). ". . . An indictment for conspiracy may be as general and indefinite as the conspiracy sought to be proved . . ." *Blaine* v. *United States,* 29 F. (2d) 651, 653 (C.C.A. 5, 1928), cert. denied, 279 U. S. 845.

For reasons more fully set forth in Part I of our brief above, and which we will not reiterate, the indictment amply establishes the effect of the illegal conspiracy upon interstate commerce. Paragraph 6 describes the goods dealt in. Paragraph 8 describes the sales made by the corporate defendants to consumers and dealers, and paragraph 9 describes the sales of these goods by the dealers to consumers. Paragraph 10 establishes that the corporate defendants purchase this merchandise from Chrysler plants in other states for resale to customers within Washington. These purchases are made in anticipation of and in response to orders and demands from customers, and the corporate defendants and dealers within the state are alleged to serve as a conduit through which the merchandise moves in a regular, continuous, and uninterrupted flow to the consumers. Paragraph 11 describes the volume of business done by the appellees and asserts that their business transactions are an integral part of and incidental to the movement of these goods in interstate commerce from other states to the consumers in Washington.

If there are trifling ambiguities in the indictment, a circumstance which we deny, the fact is neither important nor relevant. It is the precise function of the bill of particulars to reach any such ambiguities or minor uncertainties. And it is within the sound discretion of the court to grant or refuse such a motion. *Wong Tai* v. *United States,* 273 U. S. 77; *Glasser* v. *United States,* 315 U. S. 60; *United States* v. *Tarpon Springs Sponge Exchange, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the District Court was in error in its decision, and that the order dismissing the indictment should be reversed.

Respectfully submitted,

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